Peter Tang Swee Guan v Subramaniam a/l AV Sankar & Ors

COURT OF APPEAL (PUTRAJAYA) — APPEAL NO W-02–845 OF 2003
MOKHTAR SIDIN, ZULKEFLI AND LOW HOP BING JJCA
24 JULY 2008

Contract — Agreement — Construction of — Sale of shares agreements — Whether agreements executed by defendant solely for his own benefit or as a representative for other partners

On 15 June 1993, the defendant entered into an agreement ('the Giat Galian agreement') with one Ayeob for the purchase of shares in Giat Galian Sdn Bhd ('Giat Galian'). The shares were registered in the name of Ayeob but the beneficial owner of those shares was one Tan Sri Aziz. On the same date, the defendant entered into an agreement ('the Tanda Perwira agreement') with Tanda Perwira Sdn Bhd ('Tanda Perwira') for the sale of the shares in Giat Galian to Tanda Perwira. The defendant made a profit of around RM2.4m out of the transaction. The plaintiffs claimed that the defendant had entered into the two agreements not only on his own behalf but also on behalf of the plaintiffs as partners. Therefore, the profits should be divided equally between the defendant and the plaintiffs. The defendant however claimed that the two agreements were executed by him on his own behalf only and thus the plaintiffs were not entitled to their claim. The defendant further argued that the agreements were executed by him because of his relationship with Tan Sri Aziz who had given him (the defendant) the opportunity personally. Tan Sri Aziz testified that he did not deal with the plaintiffs in respect of sale of the shares. At first instance, the High Court found for the plaintiffs. The defendant thus appealed to the Court of Appeal. The issue for the Court of Appeal was whether the agreements (the Giat Galian and the Tanda Perwira agreements) were only executed by the defendant on his own behalf.

Held, allowing the defendant's appeal with costs:

(1) Applying the principles of interpretation enunciated in *Investors Building Scheme v West Bromwich Building Society* [1998] 1 All ER 98 (HL) to the two agreements, it was noted that the Giat Galian agreement was executed between the defendant as purchaser and Ayeob as vendor. The subject matter was the sale of the shares in Giat Galian by Ayeob to the defendant for consideration. No other party was

included in the Giat Galian agreement. The defendant was not expressly or impliedly referred to as having acted in a representative capacity, nor was he stated to have acted for and on behalf of the plaintiffs. The transaction was wholly and exclusively between the defendant and Ayeob, and no one else. There was also no contractual provision, express or implied, in relation to the existence of any partnership between the plaintiffs and the defendant (see para 15); *Investors Building Scheme v West Bromwich Building Society* [1998] 1 All ER 98 followed.

(2) The Tanda Perwira agreement was executed between the defendant as vendor, and Tanda Perwira as purchaser. The subject matter was the sale by the defendant of the shares in Giat Galian for consideration. The Tanda Perwira agreement also did not expressly or impliedly refer to the defendant as a representative or partner of the plaintiffs. There was no express or implied provision by which the defendant could be construed as having acted as the representative, nominee or front man for the plaintiffs. The transaction was also wholly and exclusively entered into between the defendant and Tanda Perwira. The Tanda Perwira agreement did not also refer, expressly or impliedly to the existence of any partnership between the plaintiffs and the defendant (see para 16).

(3) Tan Sri Aziz himself had confirmed that he did not deal with the plaintiffs in respect of the two agreements. This evidence and the two agreements which contained clear and unambiguous clauses tilted the balance of probabilities in the defendant's favour. The defendant had indeed executed the two agreements on his own behalf and in his own capacity (see para 17).

[Bahasa Malaysia summary

Pada 15 Jun 1993, defendan telah memasuki perjanjian ('perjanjian Giat Galian'), dengan Ayeob untuk membeli saham-saham Giat Galian Sdn Bhd ('Giat Galian'). Saham-saham tersebut telah didaftarkan dalam nama Ayeob tetapi pemilik benefisiari saham-saham tersebut adalah Tan Sri Aziz. Pada tarikh yang sama, defendan telah memasuki perjanjian ('perjanjian Tanda Perwira') dengan Tanda Perwira Sdn Bhd ('Tanda Perwira') untuk jualan saham-saham Giat Galian kepada Tanda Perwira. Defendan telah mendapat keuntungan sekitar RM2.4j daripada transaksi tersebut. Plaintif-plaintif mendakwa bahawa defendan telah memasuki dua perjanjian tersebut bukan sahaja bagi pihaknya tetapi juga bagi pihak plaintif-plaintif sebagai rakan kongsi. Oleh itu, keuntungan tersebut patut dibahagikan sama rata antara defendan dan plaintif-plaintif. Defendan bagaimanapun mendakwa bahawa kedua-dua perjanjian tersebut telah disempurnakan olehnya bagi pihaknya sahaja dan oleh itu plaintif-plaintif tidak berhak terhadap tuntutan mereka.

Defendan seterusnya berhujah bahawa perjanjian-perjanjian tersebut telah disempurnakan olehnya kerana hubungannya dengan Tan Sri Aziz yang telah memberikannya (defendan) peluang itu secara peribadi. Tan Sri Aziz memberi keterangan bahawa beliau telah berurusan dengan plaintif-plaintif berkaitan dengan jualan saham tersebut. Pada mulanya, Mahkamah Tinggi memutuskan berpihak kepada plaintif-plaintif. Defendan oleh itu telah merayu ke Mahkamah Rayuan. Isu untuk Mahkamah Rayuan adalah sama ada perjanjian-perjanjian tersebut (perjanjian-perjanjian Giat Galian dan Tanda Perwira) hanya disempurnakan oleh defendan bagi pihaknya.

Diputuskan, membenarkan rayuan defendan dengan kos:

(1) Dengan menggunakan prinsip-prinsip pentafsiran yang dinyatakan dalam *Investors Building Scheme v West Bromwich Building Society* [1998] 1 All ER 98 (HL) kepada kedua-dua perjanjian tersebut, ia ditegaskan bahawa perjanjian Giat Galian telah disempurnakan antara defendan sebagai pembeli dan Ayeob sebagai penjual. Perkara yang dipersoalkan adalah jualan saham-saham dalam Giat Galian oleh Ayeob kepada defendan untuk dipertimbangkan. Tiada pihak lain yang dimasukkan dalam perjanjian Giat Galian. Defendan secara nyata atau tersirat tidak dirujuk sebagai telah bertindak dalam kapasiti wakil, mahupun dia dikatakan telah bertindak untuk dan bagi pihak plaintif-plaintif. Transaksi itu adalah secara keseluruhan dan eksklusif antara defendan dan Ayeob, dan buka sesiapa yang lain. Juga tiada peruntukan kontraktual, nyata atau tersirat, tentang kewujudan sebarang perkongsian antara plaintif-plaintif dan defendan (lihat perenggan 15); *Investors Building Scheme v West Bromwich Building Society* [1998] 1 All ER 98 diikut.

(2) Perjanjian Tanda Perwira telah disempurnakan antara defendan sebagai penjual, dan Tanda Perwira sebagai pembeli. Perkara yang dipersoalkan adalah jualan saham-saham dalam Giat Galian oleh defendan yang perlu dipertimbangkan. Perjanjian Tanda Perwira juga tidak merujuk secara nyata atau tersirat kepada defendan sebagai wakil atau rakan kongsi plaintif-plaintif. Tiada peruntukan nyata atau tersirat yang mana defendan boleh ditafsirkan sebagai telah bertindak sebagai wakil, calon atau pengantara untuk plaintif-plaintif. Transaksi itu juga secara keseluruhan dan eksklusif dimasuki antara defendan dan Tanda Perwira. Perjanjian Tanda Perwira juga tidak merujuk, secara nyata atau tersirat kepada kewujudan sebarang perkongsian antara plaintif-plaintif dan defendan (lihat perenggan 16).

(3) Tan Sri Aziz sendiri telah mengesahkan bahawa dia tidak berurusan dengan plaintif-plaintif berkaitan dua perjanjian tersebut. Keterangan ini dan dua perjanjian yang mengandungi klausa-klausa yang jelas dan

A nyata itu menunjukkan imbangan kebarangkalian berpihak kepada defendan. Defendan sememangnya telah menyempurnakan kedua-dua perjanjian tersebut bagi pihaknya dan dalam kapasitinya sendiri (lihat perenggan 17).]

B **Notes**

For cases on construction of agreement generally, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2422–2432.

Cases referred to

C *Antaios Cia Naviera SA v Salen Rederiena AB, The Antaios* [1984] 3 All ER 229 (refd)

Investors Building Scheme v West Bromwich Building Society [1998] 1 All ER 98 (folld)

Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] 3 All ER
D 352; [1997] 2 WLR 945 (refd)

Appeal from: Suit No D3–22–558 of 1996 (High Court, Kuala Lumpur)

E *S Periasamy (M Nagarajah, M Kumar and Chrystiantini Niles with him (Maha & Peri) for the appellant/defendant.*

Malik Imtiaz Sarwar (Mathew Thomas Philip with him) (Thomas Philip) for the respondents/plaintiffs.

F **Low Hop Bing JCA (delivering judgment of the court):**

APPEAL

[1] On 8 September 2003, the Kuala Lumpur High Court gave judgment
G for the respondents ('the plaintiffs') in the sum of RM1,387,123.90, together with interest thereon at the rate of 8% per annum from 19 August 1996 to the date of realisation, and costs ('the High Court decision'). Being dissatisfied, the appellant ('the defendant') has appealed against the High Court decision.

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[2] On 9 January 2007, we heard and unanimously allowed the defendant's appeal. Thereafter, the plaintiffs applied for leave to appeal to the Federal Court. We now give our grounds of judgment.

I UNDISPUTED FACTS

[3] Giat Galian Sdn Bhd ('Giat Galian') is a private limited company with a paid up and issued share capital of 10,002 shares. Although one share and 10,001 shares were registered in the name of one Mahshad @ Mahshar bin

Ismail ('Mahshad') and one Ayeob bin Jauhari ('Ayeob') respectively, the actual beneficial owner thereof was one Tan Sri Abdul Aziz bin Zain ('Tan Sri Aziz'). Giat Galian's only asset is a block of 3,374,998 shares in Trenergy Bhd, a public company listed on the then Kuala Lumpur Stock Exchange (now Bursa Malaysia).

[4] On 15 June 1993, the defendant entered into an agreement, exh P1, with Ayeob for the purchase of 10,001 Giat Galian shares at a consideration of RM8,099,995.20 ('the Giat Galian agreement'). Prior to this, the defendant had already acquired one Giat Galian share from Mahshad.

[5] On the same date, the defendant also entered into an agreement, exh D11, with Tanda Perwira Sdn. Bhd for the sale of the 10,002 shares in Giat Galian to Trade Perwira at a consideration of RM10,462,493.80 ('the Tanda Perwira agreement'). The actual beneficial owner, Tan Sri Aziz, testified that he did not deal with the plaintiffs in respect of these shares.

[6] The defendant made a profit of RM2,362,498.60 (ie RM10,462,493.80 – 8,099,995.20) from the sale of the aforesaid shares.

PLEADINGS

[7] The plaintiffs' fourth amended statement of claim averred, inter alia, that:

(i) the plaintiffs were the ones who found the opportunity to purchase and sell the Trenergy shares;

(ii) the defendant was the plaintiffs' nominee;

(iii) the defendant and the plaintiffs were partners; and

(iv) the profits should be shared equally inter se ie ¼ each or ¾ for the three plaintiffs.

[8] The defendant's defence is that, inter alia:

(i) the two agreements were personal to him and they were executed by him because of his relationship with Tan Sri Aziz who had given the opportunity to him personally; and

(ii) the plaintiffs had no role, involvement or interest therein.

THE DEFENDANT'S EXECUTION OF AGREEMENTS

[9] It was submitted by Mr S Periasamy (Mr M Nagarajah, Mr M Kumar and Ms Chrystiantini Niles with him) for the defendant that the two

A agreements were executed by the defendant on his own behalf only and so the plaintiffs were not entitled to their claim.

[10] Plaintiffs' learned counsel, Mr Malik Imtiaz Sarwar, assisted by Mr Mathew Thomas Philip, contended that the defendant had entered into
B the two agreements not only on his own behalf but also on behalf of the plaintiffs, as partners and so the profits should be divided equally between the defendant and the plaintiffs.

[11] The learned trial judge sustained the plaintiffs' submission, allowed
C the plaintiffs' claim and made an order in terms as alluded to above. Hence, the instant appeal.

[12] Given the aforesaid background, the question for determination in the
D instant appeal may be identified as follows:

> Upon a true construction of the two agreements viz the Giat Galian agreement exh P1 and the Tanda Perwira agreement exh D11, were these two agreements executed by the defendant on his own behalf only?

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[13] The Giat Galian agreement, exh P1, and the Tanda Perwira agreement, exh D11, are to be found at pp 416–491, and pp 492–596 respectively, of the appeal record (Bahagian B).

F **[14]** As these two agreements are documented wholly in writing, the construction thereof by way of interpretation shall be by reference to specific principles. In *Investors Building Scheme v West Bromwich Building Society* [1998] 1 All ER 98 at pp 114–115 (HL), Lord Hoffman introduced a new approach and propounded the relevant principles of interpretation which
G may be culled as follows:

(i) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

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(ii) The background is the 'matrix of fact', reasonably available to the parties and, subject to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable
I man.

(iii) The law excluded from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect, legal

interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear.

(iv) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background may not merely enable the reasonable man to choose between the possible meanings of the words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 3 All ER 352; [1997] 2 WLR 945).

(v) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Cia Naviera SA v Salen Rederiena AB, The Antaios* [1984] 3 All ER 229 at p 233; [1985] AC 191 at p 201:

> ... If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.

(See also Visu Sinnadurai on *Law of Contract*, 2003, Vol 1 p 214 para 4.64).

[15] Applying the aforesaid principles of interpretation to the two agreements, it is to be noted that the Giat Galian agreement in exh P1 was executed between the defendant as purchaser and Ayeob as vendor. The subject matter was the sale of 10,001 shares in Giat Galian by Ayeob to the defendant, at a consideration of RM8,099,995.20. No other party was included in exh P1. The defendant was not expressly or impliedly referred to as having acted in a representative capacity, nor was he stated to have acted for and on behalf of the plaintiffs. Payment of the consideration was effected by the defendant for the purpose of the purchase of the shares. No other person ever made any payment therefor. As a matter of true construction, the transaction in exh P1 was wholly and exclusively between the defendant and Ayeob, and no one else. There was also no contractual provision, express or implied, in relation to the existence of any partnership between the plaintiffs and the defendant.

[16] Next, the Tanda Perwira agreement in exh D11 was executed between the defendant as vendor, and Tanda Perwira as purchaser. The subject matter was the sale by the defendant of 10,002 shares in Giat Galian at a consideration of RM10,462,493.80. As in exh P1, exh D11 had never either expressly or impliedly referred to the defendant as a representative or partner of the plaintiffs. Payment of the consideration was made by the purchaser, Tanda Perwira, to the defendant as the vendor in his personal capacity. There was no express or implied provision by which the defendant could be construed as having acted as the representative, nominee or front man for the plaintiffs. The transaction stated in exh D11 was also wholly and exclusively entered into between the defendant and Tanda Perwira. The issue of partnership had never been expressly or impliedly referred to in exh D11.

[17] The evidence of Tan Sri Aziz, the actual beneficial owner of the shares, confirmed that he did not deal with the plaintiffs in respect of the two agreements. This evidence which provides the background ie the matrix of fact, and the two agreements which contain clear and unambiguous clauses, have in effect tilted the balance of probabilities in favour of the defendant ie the defendant had executed the two agreements on his own behalf and in his own capacity, and hence militate against the plaintiffs' claim.

[18] The High Court decision is therefore plainly erroneous and unsustainable.

[19] That being the case, our answer to the above question for determination is in the affirmative.

CONCLUSION

[20] The foregoing grounds led us to unanimously allow this appeal, set aside the High Court decision and dismiss the plaintiffs' claim with costs here and below. Deposit to be refunded to the defendant.

Appeal allowed with costs.

Reported by Andrew Christopher Simon